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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 113

CHICAGO PNEUMATIC TOOL COMPANY,
Petitioner,

vs.

HUGHES TOOL COMPANY,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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The Scheffer Press, Inc.—Financial 6-2694

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Opinions Below.

The District Court filed no opinion, the reasons for the granting of the injunction appearing in the injunction order itself (R. 62-63)*, and in the transcript of the hearing in the District Court (R. 92-96). The opinion of the Court of Appeals for the Tenth Circuit (R. 209-216) is reported at 180 F. (2d) 77 and 84 USPQ 213.

The Questions Presented.

The three questions said to be presented by the Petitioner (p. 5) do not arise from the record, as will more fully appear from the Statement of the Case and Argument herein. In each "question" the Petitioner has incorporated one or more factual assertions, not supported by the record, and rejected by the Court of Appeals.

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* The following line appears to be omitted from the bottom of page 62 of the Record: "19, 1947 by the filing of a complaint herein charging de-".

The only legal question arising on the record was stated by the Court of Appeals (R. 215):

> "A Federal District Court which first obtains jurisdiction of parties and issues may preserve its jurisdiction by enjoining proceedings involving the same issues and parties, begun thereafter in another Federal District Court."

Statement of the Case.

On July 19, 1947, the complaint herein was filed charging Petitioner with infringement of four patents relating to rock bits used in rotary drilling for oil and gas (R. 1, 4).

On January 13, 1948, the Petitioner answered and filed a counterclaim for patent infringement (R. 5, 16). Among other defenses which the Petitioner then urged be *adjudicated in the present case* was an alleged estoppel said to arise from Respondent's having urged dismissal when a declaratory judgment action was filed by Petitioner and its parent company in 1944 (R. 14-15).

On April 12, 1948, the Petitioner amended its counterclaim to include charges of infringement of five additional patents (R. 17-19).

On October 28, 1948, the Petitioner filed a motion to transfer this case to Delaware, under Title 28 U. S. Code, Sec. 1404(a)*.

The Respondent opposed the motion on the ground that since the present case could not have been filed in Delaware for non-jurisdictional reasons it could not be transferred there, and that since there was no rotary drilling in or near Delaware, and most witnesses would come from the

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* "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

West or Southwest "the convenience of parties and witnesses" would not be served by a transfer (R. 54-59, 96-108). The motion to transfer was denied on March 18, 1949 (R. 35-36).

On April 16, 1949, after the present case had been set for trial, to commence on June 13, 1949, Petitioner filed a declaratory judgment action in Delaware asking adjudication of the matters already at issue in the present case and asking that prosecution of the present case be enjoined (R. 39).

On May 6, 1949, the District Court entered an order herein enjoining the prosecution of the subsequently filed Delaware suit or any other action involving the same subject matter until termination of the present case (R. 62-63). The present appeal is from this injunction and the failure to modify it (R. 206).

The 1944 Delaware proceedings, upon the basis of which Petitioner urges an estoppel, are not accurately or adequately summarized in the Petition (pp. 2-3). The 1944 complaint appears in the record at pages 166 to 192. Counts 1 and 2 (R. 166-184) sought to have the Delaware court readjudicate a previous decision by the District Court of Oklahoma and the Court of Appeals for the Tenth Circuit and enjoin further proceedings on the accounting. Count 3 (R. 184-192) alleged notices of infringement in 1935 and 1939 with respect to discontinued structures and vaguely alleged an "omnibus charge" of patent infringement in 1942. Count 3 asked for a declaratory judgment that no bits made or sold by Petitioner or its parent corporation since 1934 infringed any patents of Respondent (including the previously adjudicated patent).

The Respondent moved to dismiss each of the three counts of the complaint in the 1944 Delaware case. The first two counts were dismissed on the ground that the

Oklahoma court had first acquired, and still retained, jurisdiction of the subject matter (61 F. Supp. 767, 770-771). The third count was fatally defective in failing to properly allege any charge of infringement against Petitioner's or its parent corporation's then current devices, and in failing to allege any substantial sales except sales to the Government, which could not be adjudicated by the Delaware court but only by the Court of Claims. It was dismissed on these grounds (61 F. Supp. 767, 771-772).

The Petition for Certiorari states as a fact (p. 2) that Petitioner had been charged with patent infringement in 1942. The District Court for the District of Delaware found to the contrary (61 F. Supp. 767, 772).

The Petition for Certiorari further is predicated upon the assertion that in the 1944 Delaware proceedings, the Respondent asserted and represented that there was "no controversy" between the parties (Petition, p. 3). It is to be observed that each of "The Questions Presented" also incorporates an alleged assertion by Respondent that there was "no controversy" (Petition, p. 5). In the 1944 Delaware proceedings, the Respondent, on its motion to dismiss, argued as to the sufficiency of the complaint, and its motion was directed to the failure of that complaint to allege a controversy. There had been no charge of infringement of any then current bit, and the only substantial current sales alleged were to the government, which could not be adjudicated in that case, but only in the Court of Claims.

ARGUMENT.

The brief in support of the petition presents two alleged points. Neither is well taken.

Point I of the brief in support of the petition (pp. 8-12) urges that there is some important question of Federal law which has not been, but should be, settled by this Court. What the important question is does not clearly appear. The argument consists principally of vague, incendiary charges that Respondent has devised some "scheme" to restrict litigation to a single circuit, and reference is made to cases in which there was concentration of an industry in a particular circuit. No problem of concentration of an industry in a single circuit is involved. The brief in support of the petition calls attention to various adjudications of Respondent's patents in both the Fifth and the Tenth Circuits, and the Record shows that rotary drilling is carried on in most circuits—the Third Circuit to which Petitioner now seeks transfer being one of the few circuits in which there is no rotary drilling (R. 99-103).

At pages 10 to 12, the brief for Petitioner calls attention to what is termed "a glaring example of what can be done to avoid conflict between circuits". The "glaring example" is said to consist in Respondent's action in a case in the Fifth Circuit in withdrawing the Fletcher patent No. 1,856,-627 on appeal "rather than risk a decision on its validity by the Fifth Circuit Court of Appeals". As authority for this statement, the Petitioner refers to 176 F. (2d) 783, at p. 792. At that page of the report, the Court of Appeals for the Fifth Circuit pointed out that pending that appeal, the Fletcher patent had expired, and it was dropped in oral argument "since there was no award of damages for in-

fringement". The patent was not withdrawn from that case and it was argued in the briefs. The patent expired before oral argument, and the issues as to that patent then being moot so far as that case was concerned, counsel for Respondent did not discuss it in oral argument. The original opinion of the Court of Appeals for the Fifth Circuit (82 U.S.P.Q. 339) affirmed the trial court, but after Petition for Rehearing, the order was modified to expressly state that the issues as to the Fletcher patent having become moot, the judgment would be reversed as to that patent.

The Petitioner concludes its first point by urging that this Court should declare that one who threatens suit and retracts his charge of infringement to secure dismissal of a declaratory judgment suit, will be held to his retraction. As pointed out above, there was no charge of infringement as to the devices Petitioner or its parent was making and selling to the Government in 1944, and there was no retraction. In the 1944 Delaware case, Respondent merely urged that the complaint by Petitioner and its parent did not state a cause of action. The District Court and the Court of Appeals for the Third Circuit agreed (61 F. Supp. 767 (D.C. Del., 1945), affirmed 156 F. (2d) 981 (C.C.A. 3, 1946)). Moreover, the Court below has not ruled that if there is a retraction of a charge of infringement, the patent owner should not be held to it. The effect of the decision below is to hold that the matter should properly be tried in the present case where Petitioner first raised the issue and asked for an adjudication with respect to it.

The second point of the Petitioner (Brief, pp. 12-16) is that the decision below conflicts with repeated adjudications in various circuits that a first filed suit should take precedence over a subsequent suit on the same issues. Petitioner states (p. 14):

> "The decision below is in direct conflict with these cases although the conflict is not recognized, and none of the cases is cited in the Court's opinion."

The Petitioner errs. The Court of Appeals (R. 215) stated the legal principle which it applied in the following language:

> "A Federal District Court which first obtains jurisdiction of parties and issues, may preserve its jurisdiction by enjoining proceedings involving the same issues and parties, begun thereafter in another Federal District Court."

Among the cases cited by the Court of Appeals are two of those relied upon by Petitioner. It thus appears that the Court below recognized and applied the rule established by the very cases with which Petitioner alleges a conflict.

Petitioner now contends that there is a dispute about, and conflict of decisions on, a rule of law; but in the District Court, Petitioner's counsel expressly agreed with the legal rule urged by Respondent (and applied by the Court) and stated the issue to be merely the **application** of the rule to the particular facts of this case (R. 93).

The complaint filed in 1944 by Petitioner and its parent corporation was dismissed. It did not state a cause of action which the Delaware Court would adjudicate. That Court properly declined to take jurisdiction to declare rights as to structures being sold by Petitioner's parent corporation to the Government, which structures had never been charged by Respondent to infringe. After that suit had terminated, the Respondent in 1947 filed the present suit charging infringement by Petitioner's sales to private parties. Petitioner answered in January, 1948, alleging that Respondent's arguments as to Petitioner's parent corporation's sales to the Government constituted a bar to the action against Petitioner for its sales to others. Petitioner asked the Oklahoma Court to decide this question. Then in April, 1949, after the present case was set for trial,

Petitioner filed a new suit in Delaware raising the same issues as the present case, *i.e.*, Petitioner's right to sell to private parties. Petitioner was properly enjoined from prosecuting that case or any other involving the issues of the present case.

The Petitioner argues (pp. 14-16) that the fact that in 1947 the present suit was filed shows that there was a "controversy" between the parties in 1944. This does not follow. Moreover, the question at issue in the 1944 Delaware case was whether a justiciable controversy was alleged. Even if Petitioner were correct in stating that in 1944 there was, in fact, a "controversy" within the requirements of the declaratory judgment act (and Petitioner errs in this), the Petitioner and its parent corporation drew the complaint and would be chargeable with its adjudicated insufficiency. The action of Respondent in moving to dismiss because of the insufficient complaint was proper.

CONCLUSION.

As stated by Petitioner's counsel to the District Court, there is no dispute as to the law. The issues are merely as to the applicability to the particular facts.

No conflict of decision appears. The Court of Appeals applied the very line of cases to which Petitioner refers in urging a conflict.

It is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

The Facts.

Hughes refers in its Statement of the Case to Counts 1 and 2 of the first Delaware complaint, No. 463. Those counts have nothing whatever to do with the present action.

Hughes challenges the accuracy of our statement with respect to the 1944 Delaware proceedings (No. 463) that Judge LEAHY dismissed that action on Hughes' representation that there was no controversy between the parties. Hughes asserts repeatedly in its brief that count 3 was defective in failing properly to allege any charge of infringement and that its motion to "dismiss" (actually a motion for summary judgment because supported by affidavit) was

directed to the failure of that complaint to allege a controversy.

Judge LEAHY expressly stated the contrary. In his opinion, 61 Fed. Supp. 767, he said in footnote 16 at page 771:

> "For the purpose of this case, then, the objections to the pleadings in all three counts are rejected."

and in the last paragraph of his opinion, on page 772, he said:

> "Aside from the portions pertaining to pleading deficiencies, defendant's motion challenging plaintiff's right to maintain the present action should be granted."

The first Delaware complaint (No. 463) therefore was expressly held by Judge LEAHY to contain no deficiency in pleading the existence of a controversy in count 3.

The Tenth Circuit Court of Appeals wrote an opinion in which it made the error of fact which Hughes repeats. This entire case was presented on written documents without oral testimony, so this Court may consider the actual facts even though this error was made by the Court below. The District Judge wrote no opinion and made no findings of fact (despite Rule 52(a) F. R. C. P.).

That Judge LEAHY's decision granting summary judgment was based upon extraneous facts introduced by affidavit also appears clearly from his repeated mention of facts which were not in the pleadings.

For example, the complaint in the 1944 Delaware case (No. 463) unequivocally alleged that there was an "omnibus charge" of infringement in 1942 (R. 189, Par. 45). Judge LEAHY found at page 772 that that charge was made in a letter written by Hughes' attorney in connection with

litigation, which he termed "lawyers' chess". The complaint did not mention such a letter or state any circumstances surrounding the charge. Those were introduced into the case by affidavit in support of Hughes' motion for summary judgment. Obviously, Judge LEAHY took cognizance of such extraneous facts, and did not dismiss count 3 on the pleadings.

Indeed, Hughes did not even make a motion in the 1944 Delaware case (No. 463) to dismiss count 3 for failure to state a cause of action under the patent laws, the only cause of action for which relief was asked in count 3. This is shown conclusively by the motion itself, the pertinent portion of which is reproduced in the Appendix hereto.

This case does not depend upon an examination of detailed facts. The facts are straightforward and simple and the salient facts are these:

1. In 1933, before the advent of the Type G bit, Hughes sued Pneumatic (Mass.) for infringement of patent No. 1,647,753 (R. 136, 168). This litigation was terminated by a settlement in 1946 during accounting proceedings (R. 136) after the patent had been held valid and infringed by Judge VAUGHT in an unreported opinion affirmed by the Tenth Circuit Court of Appeals at 97 F. (2d) 945 on July 1, 1938.

2. In April, 1935, when the Type G bit was being made, Hughes notified Chicago Pneumatic of infringement of patents 1,983,283 and 1,983,316 (R. 27, No. 5).

3. In January, 1939, when the Type K bit was being made and Types G and K were being marketed, Hughes notified Chicago Pneumatic of infringement of patents 1,856,627 and 1,983,316 (R. 27, No. 6).

4. In the latter part of 1942, when the Type K bit was being made, Hughes made an omnibus charge of infringe-

ment against Chicago Pneumatic (which Judge LEAHY called "lawyer's chess"), without specifying any particular patents (R. 189; 61 F. Supp. 771, Footnote 14).

5. On July 20, 1944, while the Type K bit was still the principal bit being marketed to private industry (R. 25-26, No. 4), Type E bits were available to the public, and Hughes leased one Type E bit from Pneumatic (N. J.) at Clay City, Illinois; and on August 11, 1944 Hughes leased another Type E bit from Chicago (N. J.) in Clay City, Illinois (R. 27, No. 7; R. 30, Ex. 1).

6. On August 22, 1944, the local manager of the Oklahoma City office of Hughes attempted to purchase a third Type E bit from Chicago Pneumatic in Oklahoma City, Oklahoma; on being told that arrangements could be made for delivery in Clay City, Illinois but not in Oklahoma or Kansas, he rejected the proposal with the explanation that he (Hughes' local manager) was under instructions from Hughes' Houston office to procure the bit from Chicago Pneumatic in the Tenth Circuit (R. 27, No. 8).

7. On August 24, 1944 both Chicago Pneumatic companies filed the first Delaware action against Hughes No. 463, asking for declaratory judgment of invalidity of the following four patents:

Fletcher	No. 1,856,627
Scott & Garfield	No. 1,983,316
Scott	No. 2,011,084
Garfield & Scott	No. 2,030,442

or any other patent owned by Hughes which might be asserted against Chicago Pneumatic's bits, and non-infringement thereof by Chicago Pneumatic's Types G, K and E bits (R. 27, No. 9; R. 165, Ex. 8; R. 193, 195, 197).

8. Hughes moved to dismiss that suit, No. 463, on the ground that there was no existing controversy between the parties. Judge LEAHY granted that motion, expressly refusing to dismiss on the pleadings (pp. 2-3 above), and expressly holding that there was no controversy in fact, although expressly recognizing that a controversy had been alleged in the pleadings. He said at the top of page 772:

> "The substantive question raised by count 3 (now that the Anti-Trust Laws issue has been abandoned) is whether the count should be dismissed for failure of an actual controversy between the parties, for the statute is available only in those cases involving an actual controversy. Coffman v. Breeze Corporation, 323 U. S. 316, 324, 65 S. Ct. 298, and cases cited."

9. The renunciation of a controversy by Hughes was unequivocal. It was expressed in Hughes' brief before Judge LEAHY in the following words (R. 29):

> "This, at the very most shows that there was once a controversy which, but for plaintiff's present attempted resurrection, would have remained dead and buried."

10. After Judge LEAHY was affirmed on August 26, 1946 (156 F. (2d) 981), and certiorari denied November 18, 1946 (329 U. S. 781), and the term of this Court had expired, Hughes, on July 19, 1947, filed the present action charging infringement of the same four patents listed above in No. 7 (R. 1).

11. On November 3, 1947 Hughes answered interrogatories in the present suit and stated that the devices accused of infringement are Chicago Pneumatic's Types G, K and E bits (R. 71, No. 2).

Thus, there was admittedly a controversy in 1935 when the Type G bit was charged with infringement. There was

admittedly a controversy in 1939 when the Types G and K bits were charged with infringement. There was admittedly a controversy in 1942 ("lawyer's chess" at least) when the Types G, K and E bits were charged with infringement. There was admittedly a controversy in 1947 when suit was filed in Oklahoma charging infringement of the Types G, K and E bits.

If there was no controversy in 1944 it was only because the controversy was ended by Hughes' renunciation. Hughes' unequivocal renunciation in 1944 was obviously designed to avoid a test of its patents outside the Tenth Circuit, and with the intent of suing in the Tenth Circuit as soon as possible.

Hughes' brief in opposition to this petition professes ignorance as to the scheme which Hughes devised to circumvent the letter and spirit of the Declaratory Judgment Act and the decisions of the courts. The scheme enabled Hughes to have a declaratory judgment suit dismissed on the assertion that no actual controversy existed (R. 29) and then to bring a later suit to determine exactly the same issues while asserting that an actual controversy had in fact existed in the period before and during the pendency of the declaratory judgment suit (R. 71, No. 2). The obvious inconsistency of Hughes' assertions condemns the scheme.

* * * * * *

Hughes asserts in its brief that validity and infringement of patents involved in sales to the Government could not have been adjudicated in the first Delaware case (No. 463). Of course that case did not depend on sales to the Government, but Hughes is apparently wrong on the law. In *Western Electric Co.* v. *Hammond,* 135 F. (2d) 283 (C. C. A. 1, 1943) the Court permitted an alleged patent infringer (Western Electric) to maintain a declaratory judg-

ment suit to determine whether its sales to the Government were made under license from the patent owner despite the fact that suit for infringement could not be maintained against it, and suit for patent infringement had already been filed by Hammond in the Court of Claims. The reason, as stated on page 289, was that such a suit would remove a cloud on Western Electric's right to manufacture apparatus for the United States without risk to the Government.

The *Western Electric* case was cited and discussed with approval by the Court of Appeals for the Third Circuit in *Aralac, Inc.* v. *Hat Corporation of America,* 166 F. (2d) 286 (1948).

The Fletcher Patent 1,856,627.

The Fletcher patent involved in this suit is the one which was withdrawn in the *Robertson Rock Bit* case before the Fifth Circuit Court of Appeals. That patent is the subject of litigation in the Tenth Circuit in at least six other cases now pending, all of which are cited in our main brief.

The present case involves the same four patents which were involved in the *Robertson Rock Bit* case, which case is now awaiting decision of this Court in the case of *Robertson Rock Bit Company, Inc.* v. *Hughes Tool Company,* October Term, 1949, No. 486, on petition for rehearing of denial of certiorari. Two of the four patents, including Fletcher 1,856,627, are now before the Tenth Circuit Court of Appeals in the case of *Williams* v. *Hughes Tool Company,* on appeal from the decision of Judge VAUGHT (W. D., Okla.) at 82 F. Supp. 408, in which the Government has filed a brief as *amicus curiae* on behalf of *C. F. Williams,* charging Hughes with misuse of patents. The Court has

announced through its Clerk that it has decided to hold them valid but not infringed by a "retipper", but has referred the case to all five judges on the issue of whether retipping was proper under Hughes' "lease" arrangements.

Respectfully submitted,

FLOYD H. CREWS,
Counsel for Petitioner.

DARBY & DARBY,
HARVEY W. MORTIMER,
RAYMOND G. MULLEE,
Of Counsel.

New York, N. Y.,
August 3, 1950.

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 113

CHICAGO PNEUMATIC TOOL COMPANY,
Petitioner,

vs.

HUGHES TOOL COMPANY,
Respondent.

Affidavit of Raymond G. Mullee.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

RAYMOND G. MULLEE, being first duly sworn, deposes and says:

I am an attorney at law, admitted to practice in the highest Court of the State of New York, with an office at 8 E. 44th Street, New York 17, N. Y., and am of counsel for petitioner in this proceeding.

I was of counsel for the plaintiffs in the case of *Chicago Pneumatic Tool Company, a corporation of New Jersey* and *Chicago Pneumatic Tool Company, a corporation of Massachusetts,* plaintiffs vs. *Hughes Tool Company,* de-

fendant, in the District Court of the United States for the District of Delaware, Civil Action No. 463.

The complaint in said Civil Action No. 463 contained three counts, the first two of which were dropped on appeal in that case.

In said Civil Action No. 463 a motion was filed by Hughes Tool Company of which only the latter part related to count 3 of the complaint in that action. That portion of said motion relating to said count 3 is correctly reproduced on the following pages. Paragraph 3 of said motion refers to the Anti-Trust laws. The only mention of the Anti-Trust laws in count 3 was in paragraph 34 (R. 184) alleging jurisdiction. No relief under the Anti-Trust laws was asked in count 3 (R. 191-2).

RAYMOND G. MULLEE

Sworn to and subscribed before me this 3rd day of August, 1950.

EILEEN LAMERSON
Notary Public

(NOTARY'S SEAL)

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF DELAWARE

CHICAGO PNEUMATIC TOOL COMPANY, a corporation of New Jersey, and CHICAGO PNEUMATIC TOOL COMPANY, a corporation of Massachusetts, *Plaintiffs,* *vs.* HUGHES TOOL COMPANY, *Defendant.*	CIVIL ACTION No. 463

Motion of Defendant to Strike, to Dismiss and for Summary Judgment.

* * * * * * * * * *

In respect to Count Three of the complaint, the defendant makes the motions following:

1. To strike the same because of its failure to apply with Rule 8(e) of the Federal Rules of Civil Procedure in that the said Count is not simple, concise and direct, as provided under Paragraph 1 of Rule 8(e).

2. To strike the same (and particularly Paragraphs 44 and 45 thereof) because redundant, immaterial, impertinent and scandalous. This motion is grounded upon Rule 12(f) of the Federal Rules of Civil Procedure.

3. To dismiss the same under Rule 12(b) of the Federal Rules of Civil Procedure because it fails to state a claim under the Anti-Trust Laws, Title 15 U. S. C., Sections 2, 15 and 26, or, in the alternative, to strike all references to said Anti-Trust Laws from said Count.

4. To dismiss because there is no actual controversy of a substantial character, as required by the Declaratory Judgment Act (28 U. S. C. 400).

5. To dismiss because the said complaint is not filed in good faith and is brought by plaintiffs with unclean hands.

6. To dismiss because under its discretionary power the Court should not entertain it.

In respect to the foregoing motions to dismiss, the defendant will refer to the record, the opinions and briefs in said suit of *Hughes Tool Company* v. *Chicago Pneumatic Tool Company,* and to the affidavit of Jesse R. Stone, which is filed herewith.

ROBERT F. CAMPBELL
/s/ Robert F. Campbell

GEORGE I. HAIGHT
/s/ George I. Haight

ARTHUR G. CONNOLLY
/s/ Arthur G. Connolly

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